150A.

THE ONTARIO HUMAN RIGHTS CODE,

R.S.O. 1970, Chapter 318, as amended

IN THE MATTER OF

The complaint made by Mr. Walter Hyman of Toronto, Ontario, alleging discrimination in employment and reprisal by the Southam Murray Printing, 2973 Weston Road, Weston, Ontario

AND IN THE MATTER OF

The complaint made by Mr. Walter Hyman of Toronto, Ontario, alleging discrimination in employment and reprisal by the International Brotherhood of Teamsters Local 419, 1194 Matheson Blvd., Mississauga, Ontario

A HEARING BEFORE:

Professor John D. McCamus
Appointed a Board of Inquiry into the above matters by the Minister of Labour, The Hon. Robert Elgie, to hear and decide the above mentioned complaints.

Appearances:

Mr. A.C. Millward Mr. D.A.J. D'Oliveira,	Counsel for the Ontario Human Rights Commission and Mr. Walter Hyman
Mr. R. Dunsmore,	Counsel for Southam Murray Printing
Mr. D.J. Wray,	Counsel for International Brotherhood of Teamsters, Local 419

DECISION ON MOTION TO LIMIT INITIAL HEARINGS TO ISSUES OF LIABILITY

Further hearings concerning these two matters were convened by the Board of Inquiry on Tuesday December 22, 1981. In the course of the examination-in-chief of the complainant Walter Hyman, counsel for the respondents moved that counsel representing the complainant and the Ontario Human Rights Commission be restricted in their examination-in-chief to issues of liability and not be permitted to examine with respect to remedial questions such as the amount of monetary compensation which would be appropriate should the validity of the complaints be established in the course of these proceedings. The substance of this motion, then, is to bifurcate the hearings convened into two sets of hearings. The first set of hearings would deal exclusively with questions of liability. A second set of hearings would be convened to consider remedial questions if and only if the Board had reached the conclusion that liability had been established. Counsel for the complainant and the Commission opposed this motion on the grounds that a Board of Inquiry appointed under the Code does not have the capacity to so divide its hearing process.

The Ontario Human Rights Code does not offer specific guidance on this question. However, counsel on both sides of this issue did attempt to draw some support from competing interpretations of Section 14c of the Code which reads as follows:

> The board after hearing a complaint,
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> a) shall decide whether any party has contravened this Act; and
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> b) may order any party who has contravened this Act to do any act or thing that, in the opinion of the board, constitutes full compliance with such provision and to rectify any injury caused to any person or to make compensation therefor.

Counsel for the complainant submitted that the proper interpretation of this section is that a Board of Inquiry can carry out the mandate conferred upon it by sub-paragraphs (a) and (b) only "after hearing a complaint", i.e., after the entire hearing process has been completed. Counsel for the respondent suggested on the other hand, that the division of the mandate into two sub-paragraphs, the first requiring the Board to decide whether a contravention has occurred and the second conferring remedial powers, is some evidence of a legislative intent to permit a Board of Inquiry to make its determination on the liability question and exercise its remedial powers on separate occasions.

My own view is that neither of these suggested interpretations are sufficiently persuasive to resolve the question at hand. Both interpretations place more reliance on the grammatical structure of the provision than it can be reasonably be asked to bear. The better view, surely, is that the question of bifurcating the hearings in the manner requested was not an issue present to the mind of the legislative draftsman.

In the absence of specific legislative guidance, the issue must be addressed as one of determining whether the inherent capacities of a Board of Inquiry to control its own processes in carrying out its statutory mandate embrace a power to bifurcate its proceedings in this manner. The powers of a Board of Inquiry to control its own proceedings are of course to some extent shaped and circumscribed by both statute and common law. Certain provisions of the Code itself stipulate procedures to be followed by a Board. Further, the provisions of the Statutory

Powers Procedures Act 1971 S.O. c. 47 articulate some of the powers confided to the tribunals covered by that legislation and set minimum procedural requirements. Thus, Section 9(2) empowers a tribunal to "make such orders or give such directions at a hearing as it considers necessary for the maintenance of order ..." Section 23(1) enables the tribunal to "make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes ..." Section 6 of the Act requires the tribunal to furnish the parties with notice of certain facts prior to the hearing, and so on. Beyond this statutory framework within which a Board must conduct its proceedings, there exist the requirements of natural justice at common law which require the Board to afford procedural due process to the parties. Apart from these requirements of statute and common law, however, there is no detailed code of procedure which must be followed by Boards of Inquiry. It seems evident, therefore, that the appointment of a Board of Inquiry under the Code must carry with it an inherent power of the Board to settle its own procedures subject only to the aforementioned legal requirements.

In determining its procedures, a Board of Inquiry must obviously keep in mind the basic objectives of the statutory scheme under which it operates and should not adopt procedures which would have the effect of frustrating any of these objectives. It has been argued on behalf of the complainant that bifurcation of the proceedings would likely result in delayed justice to the complainant, assuming the complaint to be well founded, and that it would therefore subvert the objective of securing appropriate redress to the complainant at the earliest

possible opportunity. I am not persuaded, however, that this constitutes a sufficient reason for holding that a Board of Inquiry has no jurisdiction to restrict its initial hearings to liability issues with a view to reconvening to conduct hearings on remedial questions. In the first place, it is not evident to me that bifurcation of the proceedings will necessarily result in delay although delay is, of course, a distinct possibility. More importantly, however, the obvious advantages to restricting the initial set of hearings are, when balanced against the risk of delay, of sufficient weight to lead me to the conclusion that the exercise of such a jurisdiction would not be inconsistent with the fundamental objectives of the Code.

The conduct of inquiries under the Human Rights Code is an expensive process. The process is an expensive one for respondents who must bear the expense of litigation whether or not the complaint in question is successful. The process is also one which involves a significant expenditure of public funds both in furnishing the adjudicative mechanism and in bearing the cost of carriage of the complaint. Bifurcation of the proceedings will ensure that the original hearings are less costly to the parties and, indeed, where the complaint is held to be unfounded, the entire process will be less burdensome to the parties. Moreover, even in a case where the complaint is justified, it may often be the case that the parties will be able to agree to the appropriate level of compensation for injuries sustained and further hearings may therefore be unnecessary. There is, then, a public interest in the abbreviation of the hearing process where this can be done in such a way as to not inhibit in any way the full exercise of the complainant's rights under

the Code. This public interest in expedition of the proceedings would be furthered by bifurcation of the proceedings in appropriate cases and I am therefore of the view that Boards of Inquiry have the capacity to proceed in this manner in an appropriate case.

Although I am not aware of previous decisions of Boards of Inquiry in which this issue has been the subject of discussion, I draw some support for this conclusion from the decision of Professor Dunlop in Hall and Gray v. Borough of Etobicoke Fire Department (July 21, 1977) in which as Chairman of a Board of Inquiry he released a decision holding the respondents to be in contravention of the Code and further indicated that "if the amount payable cannot be satisfactorily determined among the parties, the Board would be prepared to reconvene to consider the matter". I also draw support from the experience in the labour arbitration context. The practice of bifurcating a proceeding in this way is there well established although there has been some dispute as to whether the capacity of arbitrators to so conduct arbitration hearings derives only from the consent of the parties. The better view may well be, however, that labour arbitrators are possessed of an inherent power to so conduct their proceedings. In Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association (1977), 14 L.A.C. (2d) 1, Professor Arthurs criticized two previous arbitration awards adopting the "consent theory" for the ability of arbitrators to bifurcate arbitration proceedings in the following terms:

> "Both cases seem to assume that the right of an arbitrator to postpone the question of compensation until after a decision has been made on the merits is dependent upon the consent of the parties. I am unable to agree. In my view, the arbitrator has the right and the obligation to organize the hearing as he sees fit, consistent with the requirements of natural

> justice, and in the absence of express, bilateral instructions from the parties. Long experience has shown that separation of the issues of liability and compensation is both an efficient and fair arrangement; the arbitrator needs no specific mandate from the parties to pursue this procedure.
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> Many arbitrators have exercised the right to give effective relief consequent upon their decision on the merits, in the absence of consent by the parties: see e.g. Re Consumers' Gas Co. and Int'l Chemical Workers, Local 161 (1974) 6 L.A.C. (2d) 61 (Weatherill): Re Beach Foundry Ltd. and U.A.W. (1974), 7 L.A.C. (2d) 61 (Abbott): Yardley of London (Canada) Ltd. and Int'l Chemical Workers, Local 351 (1973), 4 L.A.C. (2d) 75. Although each of these cases turns upon a point different from the issue at hand, they all share a common perception of the aribtrator's role: his remedial powers are implicit in his office, and not dependent upon the express agreement of the parties at any particular stage in the proceedings."

Although I find Professor Arthurs' analysis persuasive, it is not necessary for me to reach a conclusion as to the proper explanation for this practice in the grievance arbitration context. It is of some assistance, however, in reaching the conclusion that a Board of Inquiry established under the Code has an inherent power to organize its proceedings in this fashion if it deems it fit to do so in the circumstances of the particular case.

Having determined that a Board of Inquiry possesses the jurisdiction to bifurcate its proceedings, it remains to consider whether this is an appropriate case in which to do so. The complaints in this case relate, in part at least, to the dismissal of the complainant by the respondent employer in September of 1978. I am informed by counsel for the complainant that the complainant has since that time succeeded in obtaining employment only intermittently. Counsel for the respondents have indicated that they may wish to cross-examine the complainant at some length with respect to the question of mitigation of loss and, further, may wish to lead evidence relating to the availability of

alternative employment during this period of time. It is thus conceivable, at least, that the evidence relating to such compensation, if any, as may be appropriate will be extensive. In determining whether to accede to a motion to bifurcate proceedings, it is appropriate in my view for a Board of Inquiry to balance the risk of possible delay against the convenience to the parties of dividing the proceedings. In the present case, the latter clearly outweighs the former. I therefore grant the motion brought on behalf of the respondents to restrict the initial set of proceedings to the entertaining of evidence relevant to the determination of whether either or both of the respondents have acted in contravention of the provisions of the Code.

DATED AT Toronto this 28th day of December, 1981.

John D. McCamus
Board of Inquiry